STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 19, 2013
v TERRANCE LAMONT SHEPARD, Defendant-Appellant.	No. 303345 Saginaw Circuit Court LC No. 10-034318-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v PATRICK ALLEN MARTIN, Defendant-Appellant.	No. 303446 Saginaw Circuit Court LC No. 10-034318-FC

Before: WILDER, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

In these consolidated cases, defendants, Terrance Lamont Shepard and Patrick Allen Martin, appeal as of right from their convictions for the first-degree murder, MCL 750.316, of Kevin Amos. Following the jury trial, both defendants were sentenced to life imprisonment with no opportunity for parole. We affirm.

This case involves the tragic events that occurred on December 29, 2002, at an apartment complex in Bridgeport, Michigan. The decedent, Kevin Amos, Jr., frequently would visit his newborn daughter, who resided with her mother at an apartment complex located on King Road in Bridgeport. Amos had a key to the apartment and frequently would spend the night there. The last time Amos's family saw him was on December 27, 2002, when his father dropped him off at the apartment complex.

Defendant Martin lived in the same apartment complex in a unit on the lowest level. Tanisha Williams lived in the apartment with Martin at the time.

On December 29, 2002, Martin and Williams ran into Amos outside. The three engaged in small talk, and Martin invited Amos to come down to the apartment later in the day for a drink. Amos followed up on the invitation and showed up later that evening at Martin's apartment. After being let in, the three sat down in the living room area and each had a drink. Also present in the apartment, although in a separate room, were three of Martin's children, who were watching TV.

Brian Bables testified that he went to Martin's apartment on December, 29, 2002, to purchase some drugs from Martin, whom he described as his drug supplier. When Bables arrived, he saw Martin, Williams, defendant Shepard, and Amos. Martin introduced Amos to Bables as "my boy, Kev." Bables purchased his drugs and left the apartment.

Williams testified that, at some point, while she was in the kitchen by herself, she heard Martin raise his voice in an angry manner. When she emerged from the kitchen, she saw Martin with his fist bleeding and Amos holding his mouth. Amos then headed for the door to leave the apartment. After Martin tried to grab Amos and missed, he called out for Williams to block the door. Williams, who was close to the door after having just left the kitchen, obliged and stood in front of the door. Martin caught up, grabbed Amos, and threw him down onto the couch in the living room. Williams testified that Martin then hit Amos in the head with a pistol that he was holding. The blow knocked Amos unconscious. At this point, Williams ran into the room where the children were and turned the TV volume higher to hide any commotion and instructed the children to stay in the room.

Williams next recalled seeing Amos bare naked on the floor. She testified that this was the first time she realized that Shepard was present. During this time, Martin called out for someone to get some trash bags because he was concerned that Amos was going to defecate or urinate. Williams did not know who got the trash bags, but Martin ended up with the bags, and they were placed on the ground under Amos.

Williams testified that she saw Martin kick Amos many times in the genital area and in the head while his body was on the ground. Martin then instructed Williams and Shepard to tape up Amos with duct tape. Williams said something to Martin that made him "snatch" her up and put her against the wall and, while wielding the pistol, said, "[E]ither get down or lay down." Williams testified that she knew that this meant to either "get down" with the plan and comply or get killed, i.e., to lie down dead next to Amos.

In sum, Williams testified that Martin taped Amos's hands behind his back. She explained that Shepard helped hold Amos's body up to assist Martin in this task. She also testified that Shepard, by himself, taped Amos's feet, and that she taped Amos's head. Williams explained that while she was taping Amos's head, Martin and Shepard walked down the hall and talked out of earshot. She testified that she started taping at the bottom of his chin and worked her way up. But when Martin returned, he complained that Amos was still breathing because his nostrils were not taped. He instructed Williams to cover the nostril area. Williams complied and even held her hands over the taped nostril area until she noted no more breathing. Williams testified that during this time, she wore gardener gloves and Martin and Shepard shared using latex dishwashing gloves.

Bables testified that he received multiple phone calls from Martin that evening. Martin kept asking for Bables to come over and noted that "it can't be anybody else." Bables eventually relented and drove over to Martin's place. On the way, he picked up his friend, Tom Fuller. When Bables and Fuller arrived at Martin's apartment, Fuller remained in the car. The first thing Bables saw upon entering the apartment was Amos's naked body taped up on the floor. Bables noted that Shepard and Williams also were present. After seeing the body, Bables "freak[ed] out" and told Martin that he could not be there and had to leave. Both Bables and Martin then walked outside, where Bables asked Martin, "What happened?" Martin replied that he and Amos "got to fighting" and that he "f***ed up" and did not know what to do. Bables again stated that he could not be there and left. But before leaving, Martin told Bables not to tell anyone about what had happened. Not heeding Martin's words, Bables immediately told Fuller and later told his girlfriend what he had seen.

Back at the King Road apartment, Williams rubbed rubbing alcohol down Amos's entire body. Though she was not positive, she thought that Martin was the person who provided her with the rubbing alcohol. Then, Amos's body was wrapped up in a blue blanket, and Martin put him into a nearby closet. Williams testified that Shepard left the apartment after Amos was killed but before his body was placed in the closet.

According to Bables, a few days later, he was back at the King Road apartment to pay Martin some money he owed from the prior drug deal. While counting out the money, Bables asked Martin, "What happened to that guy?" Martin replied that he was in the closet. Martin also said that he put 50 cents in Amos's mouth along with "some dope" to make it look like a drug transaction.

Sometime after the murder,[1] Martin with the help of Williams, Bables, and Derryl Martin ("Derryl") removed Amos's body from the apartment and transported it to a turnout near Ormes and Lewis roads. This location was at the top of a hill that descended down to the Cass River. Amos's body was later found in March 2003 by some fishermen.

An autopsy revealed that Amos died of asphyxia; he suffocated to death. The autopsy also revealed that Amos had two U.S. quarters in his stomach and a plastic baggie in his mouth that contained some grayish white powder.[2]

The discovery of Amos's body made the local news. A few days after the news broke, Martin admitted to his then-fiancée, Eva Haire, that he and Amos had gotten into a fight and that he, along with Williams and Shepard, killed Amos. According to Haire, Martin stated that the fight and resulting death happened because Amos supposedly was "mean mugging"[3] Martin because Amos suspected that Martin was "messing with" his daughter's mother, who lived in the

[1] There was conflicting testimony whether it occurred the "next" night, a "couple" nights, or "several" nights later.

[2] A Michigan State lab analysis revealed that the powder was not a controlled substance.

[3] Haire stated that "mean mugging" means to give a dirty look.

upstairs apartment. Haire also testified that Martin admitted to disposing the body and going back to the apartment and pouring acid all over to conceal any evidence of the crime. Additionally, Derryl testified that several weeks after helping move Amos's body, he heard Martin admit that he had killed Amos after the two got into a fight.

The police's investigation eventually led them to Bables, who agreed to aid them. Bables was wired for several conversations he had with Martin and Shepard.

Eventually, Martin, Shepard, and Williams were all charged with first-degree murder. Williams entered into a plea agreement that, in exchange for truthful testimony against Shepard and Martin, she would be sentenced to serve 20 to 40 years in prison for second-degree murder.

During jury selection, the prosecutor used five of his eight peremptory challenges on black prospective jurors. These challenges left the venire, and ultimately the jury, with only one black person. Defendants, who are also black, objected and claimed that the exclusion of the black venirepersons violated their constitutional rights. The trial court conducted a *Batson*[4] review. As part of the review, the prosecutor provided the following race-neutral explanations for striking the five black venirepersons:

- For the first prospective juror, the prosecutor noted that the person noted on his juror questionnaire that he had a mental breakdown and had been confined to a mental health facility. Given the venireperson's young age, the prosecutor surmised that this confinement had to have happened "not very long ago" and decided to use the peremptory strike.

- For the second prospective juror, the prosecutor noted that this venireperson had a prior criminal history as a shoplifter, and he did not want her on the jury.

- For the third prospective juror, the prosecutor was "concerned about her grasp of aiding and abetting." The prosecutor also was concerned because the venireperson had heard some information or rumors about this case from her co-workers who lived in Bridgeport.

- Related to the fourth prospective juror, the prosecutor explained that this venireperson was "very young" and a student, and the prosecutor preferred someone with more life experience. Additionally, the venireperson had indicated that he had some conflict with classes as well.

- And with regard to the last prospective juror, the prosecutor was concerned about a funeral that this venireperson needed to attend. Importantly, the prosecutor noted that the venireperson was not sure when the funeral was going to actually occur.

The trial court found that the prosecutor's reasons were not offered as a pretext to strike the potential jurors because of their race and, therefore, denied defendants' *Batson* challenge.

[4] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

At trial, defense counsel for Martin attempted to impeach Williams's credibility by alleging during his opening statement that Williams chose to accept the plea deal because "the deal . . . puts the blame on [defendants]." The prosecutor, instead, stressed throughout trial that the agreement only required Williams to "testify truthfully." Defense counsel objected to the following references to the plea agreement, claiming that they constituted improper vouching of Williams's credibility:

- The prosecutor stated during opening statements, "[Williams] has agreed to a 20 to 40 year sentence, and in return for that, she must testify truthfully in this trial. . . . The agreement is she must testify truthfully."

- The officer in charge testified, "[The plea agreement] provided that she would plead guilty to second degree murder and that she would testify truthfully in these proceedings."

- The prosecutor asked Williams, "And is the agreement also that you testify truthfully?"

The trial court, however, found that the references were permissible.

At trial, Martin chose not to testify. Shepard did testify and denied any involvement in the murder. The essence of his testimony was different from his prior statements he had made to the authorities. Before trial, Shepard was steadfast that he had no knowledge of the incident and was not present at the King Road apartment, although he had seen Amos around the apartment building before. However, at trial, Shepard admitted that he did go to the King Road apartment the day of the murder, but Amos was already taped up by the time he got there. Shepard testified that Martin allowed him to leave, but if he told anyone what he saw, Martin would kill him. Shepard stated that all of his prior statements were lies, including his previous admission that he previously had seen Amos around the apartment complex. In explaining why he told authorities that he had no knowledge of the incident, he testified that he took Martin's threat seriously and feared for his life. To establish why he had a basis for that fear, Shepard relayed a story that a cousin told him, where Martin stripped the cousin naked and tried to kill him but failed only because the gun Martin was using jammed.

In light of the trial court's decision to permit the prosecutor's references to the fact that Williams's plea agreement required her to testify truthfully, defense counsel requested a cautionary instruction explaining that even though her plea agreement "required" her to tell the truth, it was no guarantee of her truthfulness. The trial court declined to provide any further cautionary instruction to the jury. Instead, it provided the following instructions:

> As jurors, you must decide what the facts of this case are. This is your job and nobody else's. You must think about all the evidence and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said. What you decide about any fact in this case is final.
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> * * *

As I've said before, it is your job to decide what the facts of this case are. You must decide which witnesses you believe and how important you think their testimony is. Do you [sic] not have to accept or reject everything a witness said. You are free to believe all, none or part of any person's testimony.

* * *

Tanisha Williams says that she took part in the crime that the defendants are charged with committing. Ms. Williams has already been convicted of charges arising out of the commission of that crime. . . . Such witnesses are called accomplices. You should examine an accomplice's testimony closely and be very careful about accepting it. You should think about whether the accomplice's testimony is supported by other reliable evidence, because, then, it may be more reliable. . . .

When you decide whether you believe an accomplice, consider the following:

Was the accomplice's testimony falsely slanted to make each defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

Has the accomplice been offered a reward or been promised anything that might lead him or her to give false testimony?

Has the accomplice been promised that he or she will not be prosecuted or promised a lighter sentence or allowed to plead to a less serious charge? If so, could this have influence his or her testimony?

Does the accomplice have a criminal record?

In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure that you examine it closely before you base a conviction on it.

You have heard testimony that a witness, Tanisha Williams, made an agreement with the prosecutor about charges against her in exchange for her testimony in this trial. You've also heard evidence that Ms. Williams faced a possible penalty of life without the possibility of parole as a result of those charges. You are to consider this evidence only as it related to Ms. Williams' credibility and as it may tend to show Ms. Williams' bias for self-interest.

After deliberating, the jury found both Martin and Shepard guilty of the first-degree murder of Amos.

I. DOCKET NO. 303345

A. Sufficiency of the Evidence

Shepard first argues that there was insufficient evidence to support his conviction of first-degree murder as an aider or abettor. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo, and the evidence is viewed in a light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005) (internal citations omitted).

One who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if the person directly committed the offense. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). To support a verdict that a defendant aided and abetted a crime, the prosecutor must prove that "'(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time [the defendant] gave aid and encouragement.'" *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *Carines*, 460 Mich at 758. Some of the factors that may be considered include a close association between the defendant and the principal and the defendant's participation in the planning or execution of the crime. *Id.*

Shepard claims that there was "no evidence that [he] performed acts or gave encouragement that assisted Martin and/or Williams in the commission of the crime." This assertion is unfounded. Williams testified that, more than simply being present during Amos's murder, Shepard taped Amos's feet together and held Amos up to allow Martin to tape Amos's hands behind his back. These acts clearly assisted in the commission of the crime. Therefore, Shepard's claim that there was no evidence to show that he provided assistance is without merit. While Williams's testimony differed from Shepard's testimony, it was the jury's role to decide issues of credibility. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012). Accordingly, his claim fails.

B. Martin's Statements to Bables

Shepard next argues that his due-process rights were violated and he was denied a fair trial because Martin's statements that also implicated Shepard were inadmissible hearsay. We disagree.

To preserve a due-process issue for appellate review, a defendant must raise the issue in the trial court. *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007). Shepard's motion in the trial court to exclude Martin's statements was based solely on the position that the statements were inadmissible hearsay. Thus, since Shepard did not object to the evidence on

due-process grounds, the issue is not preserved. See *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). Unpreserved constitutional issues are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 764. A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665-666; 821 NW2d 288 (2012).

Even though Shepard frames the issue as one involving due process, his argument on appeal simply focuses on how Martin's statements to Bables were inadmissible hearsay. At issue is the admissibility of the statements Martin made to Bables that implicated Shepard. Our Supreme Court in *People v Taylor*, 482 Mich 368; 759 NW2d 361 (2008), addressed this specific scenario. The *Taylor* Court established that the admissibility of nontestimonial statements is governed solely by the rules of evidence. *Id.* at 378; see also *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Burns*, 494 Mich 104, 114 n 34; 832 NW2d 738 (2013), quoting *California v Giles*, 554 US 353, 376; 128 S Ct 2678; L Ed 2d (2008). In *Taylor*, the Court held that one defendant's admissions that also implicated a co-defendant were admissible against that other co-defendant because the original statement met the criteria of being a statement against interest pursuant to MRE 804(b)(3). *Taylor*, 482 Mich at 374-380. This is the same scenario that we are confronted with in the instant case.

Generally, out-of-court statements that are offered to prove the truth of the matter asserted are inadmissible hearsay. MRE 801(c); MRE 802. Such statements are admissible only when they fall under a recognized exception to hearsay. MRE 802. MRE 804(b)(3) provides that, when a declarant is unavailable, the declarant's out-of-court statement against interest may avoid the prohibition on hearsay if certain conditions are met. The rule allows, in pertinent part, for the admission of the out-of-court statement if the statement, at the time it was made, "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." MRE 804(b)(3).

On appeal, Shepard claims that Bables's "recordings and testimony of Martin implicating [Shepard] lack sufficient indicia of reliability because Bables was acting on behalf of the police years later in exchange for money, dismissal of charges against his friend, reduction of a sentence he was serving and to avoid prosecution for a new offense he had committed." However, Shepard's position is undermined in two important ways.

First, the "indicia of reliability" test he relies on is not applicable anymore. That test was announced in *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and adopted by our Supreme Court in *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993), as a means to limit the scope of otherwise admissible hearsay to safeguard a defendant's constitutional right to confrontation. However, *Roberts* was later overruled by *Crawford*, 541 US 36, and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), which redefined what types of hearsay statements implicated the Confrontation Clause. Consequently, our Supreme Court in *Taylor*, 482 Mich at 378, abrogated the portion of *Poole* related to its discussion of the "indicia

of reliability" test and the Confrontation Clause. But *Taylor* left Poole's discussion on MRE 804(c)(4) intact. *Id.* Thus, because the "indicia of reliability" concept is no longer good law, Shepard's position lacks merit.[5]

Second, Shepard's attack on the admissibility of Martin's statements is focused on the reliability of *Bables himself*, but this is not the proper view. Generally, hearsay is inadmissible because it is deemed to be "presumptively unreliable." *Poole*, 444 Mich at 168, abrogated in part *Taylor*, 482 Mich 368. The *Poole* Court explained that "[t]he admission of hearsay evidence is disfavored because it is difficult, if not impossible, for the trier of fact to assess the reliability of hearsay statements or of the hearsay *declarant*. The trier of fact is unable to view and evaluate the demeanor and manner of the *declarant* while making the hearsay statement." *Id.* at 160 (emphasis added). But "[c]ertain exceptions—including one for declarations against penal interest—have evolved that allow the admission of hearsay statements where the circumstances indicate that, unlike general hearsay statements, such statements may be presumed to be reliable." *Id.* The *Poole* Court quoted with approval the Federal Rules of Evidence advisory committee:

> The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. The principle concern of the rule barring the admission of hearsay, together with all the exceptions, is the reliability of the unsworn, out-of-court statement considering its content and the circumstances in which it was made. [*Id.* at 161.]

Thus, Bables's reliability is not the proper focus. Because Bables testified, the jury was able to judge his reliability themselves.[6] Instead, the focus on the admissibility of the statements is whether the *declarant*, Martin, was reliable. His many statements to Bables inculpated him in the murder of Amos. As the trial court noted, "it's a statement against interest that nobody would have said – unless it was true, and I think it has inherent reliability." Accordingly, they were statements that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." Accordingly, Martin's statements to Bables were admissible as an exception under MRE 804(b)(3), *Taylor*, 482 Mich at 374-380, and Shepard has failed to show how he was denied a fair trial.

C. Prior Acts Testimony

Shepard claims that evidence of his prior interaction with Martin, related to Martin's drug dealing, was inadmissible under MRE 404(b). However, because Shepard does not cite to any particular testimony that he challenges on appeal as being inadmissible, we deem the issue to be

[5] Moreover, Shepard's argument is not related to the Confrontation Clause in any event.

[6] Further, Bables's reliability is of even less importance in this instance because one of his conversations with Martin was recorded and admitted at trial.

abandoned. A "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (quotation marks omitted); see also *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998) (stating that failing to properly present an issue for appellate review results in the issue being abandoned). With no citation to the record identifying what testimony Shepard believes should not have been admitted, it is virtually impossible to effectively review the issue.

D. *Batson* Challenge

Shepard argues that he was denied equal protection under the law because the prosecutor impermissibly excluded jurors on the basis of race. We disagree.

The three parts of a *Batson* challenge are reviewed as follows: the first part is a mixed question of fact and law that is subject to both a clear error and de novo review, respectively; the second step is reviewed de novo; and the third step is reviewed for clear error. *People v Knight*, 473 Mich 324, 342-345; 701 NW2d 715 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, ___ Mich App ___; ___ NW2d ___ (Docket No. 307597, issued June 18, 2013), slip op, p 7.

"Under the Equal Protection Clause of the Fourteenth Amendment, a party may not exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race." *Knight*, 473 Mich at 335 (footnote omitted). The United States Supreme Court in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), outlined a three-part process to determine the constitutionality of peremptory challenges.

> First, the opponent of the peremptory challenge must make a prima facie showing of discrimination. To establish a prima facie case of discrimination based on race, the opponent must show that: (1) he is a member of a cognizable racial group; (2) the proponent has exercised a peremptory challenge to exclude a member of a certain racial group from the jury pool; and (3) all the relevant circumstances raise an inference that the proponent of the challenge excluded the prospective juror on the basis of race. The United States Supreme Court has made it clear that the opponent of the challenge is not required at *Batson*'s first step to actually prove discrimination. Indeed, "so long as the sum of the proffered facts gives 'rise to an *inference* of discriminatory purpose,'" *Batson*'s first step is satisfied. [*Knight*, 473 Mich at 336-337 (citations and footnotes omitted).]

Next, once a prima facie showing has been made, the burden shifts to the proponent of the peremptory challenge to articulate a race-neutral explanation for the strike. Notably, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett v Elem*, 514 US 765, 768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). "Rather, the issue is whether the proponent's explanation is facially valid as a matter of law." *Knight*, 473 Mich at 337. While the United States Supreme Court noted that in rebutting a prima facie case, the proponent "must give a 'clear and clear and reasonably specific' explanation for his 'legitimate reasons' for exercising the challenges," *Batson*, 476 US at 98 n 20, it later clarified that "[t]his warning was meant to refute the notion that a prosecutor could satisfy his burden of production by merely denying having any discriminatory motive or by merely affirming his good faith,"

Purkett, 514 US at 769. In other words, "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id.* at 768 (quotation marks omitted).

"Finally, if the proponent provides a race-neutral explanation as a matter of law, the trial court must then determine whether the race-neutral explanation is a pretext and whether the opponent of the challenge has proved purposeful discrimination." *Knight*, 473 Mich at 337-338.

During voir dire, the prosecutor exercised five of his eight peremptory challenges on black venirepersons, which left the final jury with only one black person.

Because the prosecutor offered a race-neutral explanation and the trial court ruled on whether the explanation was a pretext, *Batson*'s first step becomes moot. *Knight*, 473 Mich at 338. Thus, our analysis begins with the second step of the process. After reviewing the reasons offered by the prosecutor for striking the black prospective jurors, that one had a history of mental illness, one had a prior criminal record, one had difficulty understanding the concept of aiding and abetting and that same person also had previously heard information about the case from co-workers, one was "very young" and the prosecutor wanted someone with more life experience, and one had a potential conflict because of a pending funeral she needed to attend, we conclude that a discriminatory intent was not inherent with any of the prosecutor's explanations and that, accordingly, the explanations satisfied step two of the *Batson* process. *Purkett*, 514 US at 769.

For the third step of the process, the trial court found that the prosecutor's reasons for dismissing the venirepersons were not pretextual. After our review of the record, we conclude that the trial court did not clearly err in this determination.

First, all of the proffered reasons were indeed factually supported by the record. The first venireperson listed on his juror questionnaire that he had been confined to a mental health facility because of having suffered a mental breakdown. Further, the person listed his current age as 21. The second venireperson admitted on her questionnaire that she had previously been convicted of shoplifting. During voir dire, the third potential juror stated that she had heard "a lot" about the case from her co-workers and the news. Additionally, when she was asked later what she knew about the "concept of aiding and abetting," the venireperson replied that she thought it involved when an accomplice "left the scene of the crime." With respect to the fourth prospective juror, the record does not indicate his age, but he did state that he was a college student. Further, when the trial court asked the panel if anyone had a scheduling problem with the trial's expected length of three or four weeks, he replied, "Yes, sir, I have class for college at 4:00." For the final prospective juror, when the panel was asked whether there were any reasons that anyone might not be able to be focused and attentive during the trial, she replied that her half-sister's mother died two days earlier, and she had concerns about not being able to attend the funeral and not being able to lend support to her half-sister. Notably, the venireperson was not yet aware of any date that was set for the funeral, but she opined that the funeral probably would be held either the following Monday or Tuesday.

Next, the prosecutor's reasons for excluding each venireperson included legitimate, nonracial reasons. We question whether the prosecutor's reliance on the third venireperson's

failure to properly articulate the law of aiding and abetting would be sufficient, if that were the only reason the prosecutor relied on. The juror was asked to give her opinion on what the "concept of aiding and abetting" meant, without first having been instructed what the law actually was. A potential juror's failure to correctly recite the law before even being instructed on it has little to no impact on how the potential juror would be able to carry out her duties as instructed by the trial judge. See *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011) (stating that jurors are presumed to follow the trial court's instructions). Accordingly, reliance on such an insubstantial reason to strike a potential juror may serve as evidence of a pretextual motive. See *Miller-El v Dretke*, 545 US 231, 251-252; 125 S Ct 2317; 162 L Ed 2d (2005) (stating that determining whether a pretextual motive exists requires assessing "the plausibility" of the proffered reasons for the peremptory strike); *United States v Tucker*, 90 F3d 1135, 1142 (CA 6, 1996) (noting that an "inherently suspect" explanation can indicate pretext). However, the prosecutor also relied on the fact that the juror had heard information on the case from her co-workers. This, unlike the prosecutor's other reason, clearly is a valid concern related to a juror's capability to rely only on the evidence admitted at trial. See *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Thus, when viewing the record as a whole, we are not left with a definite and firm conviction that the trial court made a mistake for this final step of the *Batson* process. As a result, Shepard has failed to establish any discriminatory intent on behalf of the prosecutor, and his *Batson* challenge fails.

E. Vouching/Bolstering of Witness

Shepard next argues that he was denied a fair trial because of the alleged improper vouching for Williams's credibility that took place during trial. We disagree. Whether a defendant was denied his due process rights under the Fourteenth Amendment is a constitutional question that is reviewed de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

At issue are the prosecutor's and the officer in charge's references at trial to the fact that Williams's plea agreement included a provision that she would testify truthfully against Shepard and Martin. It is well established that a prosecutor may not vouch for the credibility of witnesses by implying that he has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of his office behind the testimony of witnesses. *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). But evidence of a plea agreement containing a promise of truthfulness is admissible as long as the prosecutor does not suggest that there is special knowledge of whether the witness actually testified truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *McGhee*, 268 Mich App at 630. Plus, a prosecutor's conduct must be evaluated in light of defense arguments. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007).

Defense counsel for Martin alleged during opening statements that Williams chose to accept the plea deal because "the deal . . . puts the blame on [defendants]." Although counsel did not explicitly state that the agreement itself *required* putting the blame on defendants, the jury could have inferred that is what counsel meant. Thus, it was proper in this light for the prosecution to stress during its presentation of its proofs that the agreement did not require Williams to blame anyone in particular. *Id.*

Moreover, despite several references to the plea agreement, neither the prosecutor nor the officer in charge implied having any "special knowledge" related to Williams's credibility. Nor did any of the comments place the prestige of the prosecutor's office behind Williams's testimony. Instead, the references simply were to the existence of the plea agreement itself, which was permissible. *Bahoda*, 448 Mich at 276. Therefore, we conclude that there was no improper vouching, and Shepard's claim of being denied a fair trial fails.

II. DOCKET NO. 303446

A. *Batson* Challenge

Martin also claims that he was denied his constitutional rights when the prosecutor struck venirepersons on account of their race. However, as we discussed in Part I-D, *supra*, the trial court did not clearly err in determining that the prosecutor's uses of the peremptory challenges were not race related.

Additionally, Martin further argues that the prosecutor's proffered reason for striking the "very young" student was a pretext because the prosecutor did not ask the venireperson any follow-up questions when this potential conflict was mentioned. However, Martin has not identified any law that requires a prosecutor to ask these types of follow-up questions. All that matters is whether the prosecutor provided a race-neutral explanation and that the reason was not a pretext. *Knight*, 473 Mich at 337-338. There is no dispute that the proffered reason of being "very young and . . . a student" was not related to race. Further, there was nothing in the record to give us a definite and firm conviction that the trial court erred in determining that the reason was genuine. Accordingly, Martin, like Shepard, cannot prevail on this issue.

B. Cautionary Instruction Regarding Williams's Truthfulness

Martin next argues that the trial court should have given a cautionary instruction related to Williams's credibility, given that her plea agreement, which "required" her to tell the truth, was no guarantee of her truthfulness. We disagree. This Court reviews claims of instructional error de novo. *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). "But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks omitted).

Martin claims that the trial court erred by failing to instruct the jury that it could not rely on "the government's assessment that a witness was testifying truthfully in accord with her plea agreement." However, we first note that the jury was not presented with any "government assessment." As both parties noted at trial, just because Williams promised to testify truthfully did not mean that the government was ensuring that her testimony was indeed truthful. See *Bahoda*, 448 Mich at 267. Defense counsel even stated in the jury's presence that "[e]ven though that language [promising to testify truthfully] is used in the agreement, it's obviously not a guarantee as to whether there's truthfulness or not. That's ultimately the jury's determination." The trial court agreed with this fundamental principle and replied that it thought that "the trier of fact will understand that." If there had been any "government assessment," then that would encroach on becoming impermissible vouching that was discussed in Part I-E, *supra*. Moreover,

the jury was instructed that only it was responsible for determining credibility and that it should view Williams's testimony with caution because the fact that she was an accomplice and accepted the plea agreement could demonstrate a "bias for self-interest." Therefore, we do not see how any further instruction would have added anything of significance. Accordingly, the trial court did not err in refusing to provide any additional instructions on this matter.

C. Shepard's Testimony Implicating Martin

Martin argues that Shepard's testimony recounting an attack Martin made on another cousin was so prejudicial that it deprived him of a fair trial. We disagree.

To preserve a due-process issue for appellate review, a defendant must raise the issue in the trial court. *Hanks*, 276 Mich App at 95. Martin did not object to Shepard's testimony and concedes that the issue is not preserved. Unpreserved constitutional issues are reviewed for plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 764. A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *Vaughn*, 491 Mich at 665-666. Furthermore, reversal for unpreserved matters is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

At trial, Martin declined to testify, but Shepard did testify. In explaining why he had lied to the authorities during the investigation, Shepard testified that Martin threatened to kill him if he mentioned anything. On this matter, his counsel inquired into this topic in more detail:

> *Q.* Why were you lying?
>
> *A.* Because, for one, I knew [Martin], and what he said, that threat, I didn't just fear for myself, but I feared for my fiancée at the time now is my wife and my – our kids. And I knew he knew where I stayed at. And if I would have said something to them, they would have told him who said it. And he would have came to my house, and I probably wouldn't be sitting here in front of you guys today.
>
> *Q.* Were you aware of anything about [Martin] that caused you to think that he was serious?
>
> *A.* Oh, yes, sir.
>
> *Q.* What, what did you know?
>
> *A.* Well, one of our cousins that we know real well, and [Martin] went to his house and made him strip out of his clothes and took him for a ride. And he told me –
>
> *Q.* Who told you now?
>
> *A.* My cousin, my other cousin, that [Martin] put the gun to his head and to shoot him, but the gun jammed. And he said that's the only way [Martin]

didn't kill me, he said the gun jammed, and [Martin] jumped in the truck and left – left me there naked.

Shepard was relaying an out-of-court statement made by his cousin for proving the truth of the matter asserted – that Martin stripped the cousin and attempted to kill him. Thus, the statement was inadmissible hearsay. MRE 801(c); MRE 802. Moreover, we note that even if Shepard was only presenting the statement to show why he supposedly feared Martin – and not necessarily to prove the truth of the matter asserted – the testimony likely would have been inadmissible under MRE 403 since its probative value would have been substantially outweighed by the danger of unfair prejudice. Therefore, we conclude that Shepard's testimony on this topic primarily was inadmissible.

However, even though the essence of the testimony was inadmissible, Martin cannot prevail on his claim of error because he cannot show that the error affected the outcome of the proceeding. *Vaughn*, 491 Mich at 665-666. The evidence was overwhelming that Martin was intimately involved with the murder of Amos.

In addition to the decisive eyewitness accomplice testimony of Williams, there were numerous corroborating witnesses that placed Martin in the center of the events of December 29, 2002. Perhaps the most important would be Martin's own admissions to various people. Martin at some point had admitted his culpability to many others, including Bables, Haire, and Derryl. Bables testified about how Martin tried to contact him numerous times after the murder and how Martin admitted that he "f***ed up" and did not know what to do. Haire testified that Martin admitted that he, along with Williams and Shepard, killed Amos and that the fight started because Amos gave Martin a dirty look. Derryl testified that Martin admitted that he killed Amos.

There was also substantial evidence of Martin's consciousness of guilt, where he poured acid over the floors of the apartment, threw paint on its walls, and had Amos's body rubbed down with rubbing alcohol before taking the body away and disposing of it near the Cass River. See *People v Cutchall*, 200 Mich App 396, 404-405; 504 NW2d 666 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686, 691-694; 560 NW2d 360 (1996) (stating that attempts to conceal the commission of a crime are relevant to show consciousness of guilt).

Finally, it is important to stress that the jury *rejected* Shepard's testimony. Shepard testified that he only arrived at the apartment after Amos was already dead and that Martin threatened to kill him if he told anyone what he saw. Clearly, the jury, in finding Shepard guilty, did not find him credible. Thus, there is nothing to indicate that the jury believed his other testimony related to what his cousin allegedly told him about Martin. Therefore, under the plain error standard, Martin has not shown how Shepard's testimony regarding Martin's prior incident with another cousin affected the outcome of the proceedings.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Pat M. Donofrio
/s/ Jane M. Beckering